Supreme Court of the United States.

OCTOBER TERM, 1943.

FRANK W. LYMAN ET AL., EXECUTORS,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The facts upon which the petition is based appear in the petition and need not be stated here, although they will be somewhat amplified in the course of this brief.

Argument.

The declaration states that the tax was assessed May 25, 1931. The writ is dated May 18, 1938. The petitioners pleaded the Statute of Limitations. It was thus apparent on the record that the statute applied. Counsel for the respondent stated that the suit is not timely brought, and then continued further that, with the permission of the Court, he withdrew that action, he believed a stipulation would be entered withdrawing the action and that it was not before the Court. No stipulation was filed. There was then established in the plaintiff a manifested right. The

case had then progressed so far that the petitioners were entitled to a judgment.

Prudential Insurance Company v. *Stack,* 60 Fed. (2d) 831, states:

> "The rule is well established that a plaintiff may be granted leave to dismiss his suit * * * when the case has not so far progressed as to entitle the defendant to a decree."

The Federal Rules of Civil Procedure relate to pleading, practice and procedure and do not affect the substantive rights of litigants. The Committee, in discussing the rules in Federal Rules of Civil Procedure and Proceedings of the American Bar Association Institute, at page 183, paragraph 3, states:

> "The Committee concluded that Statutes of Limitations are matters of substantive law and not procedure."

Widdows v. *Keaton,* 44 Fed. (2d), at page 841, states:

> "The defense of the Statute of Limitations to an action is not a mere technical defense, but is substantial, and involves the merits of the right of recovery."

Rules do not give the Court arbitrary power to dismiss. They do not enlarge the discretionary power of the Court. The right to dismiss must be exercised with reference to the right of both litigants. *Chicago & Alton Railroad Company* v. *Union Rolling Mill Company,* 109 U.S. 714.

The motion to dismiss provided for under the Rules is not designed to reach a case in which the plaintiff would not be entitled to relief after the matter of defense had

been presented. In the instant case the matter of defense was distinctly before the Court by the plea of the Statute of Limitations, but the Court refused to take jurisdiction. The right of action here, being an action based on the Internal Revenue Laws, was created by an Act of Congress. *Mutual Life Insurance Company* v. *Krejci,* 123 Fed. (2d) 594, states:

> "The Court may not refuse arbitrarily to exercise jurisdiction when it is invoked by appropriate proceedings. Rather, it must exercise the jurisdiction created by legislative act, in the absence of a showing of facts which constitute a recognized legal ground justifying a refusal to pass on the merits."

The case of *Cohens* v. *Virginia,* 6 Wheat. 264, states that a Federal Court cannot decline to exercise jurisdiction granted by an Act of Congress. At page 404 it states:

> "We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given."

Here the Court should have taken jurisdiction because it was created by an Act of Congress and was invoked by appropriate proceedings.

The provision of the Federal Rules of Civil Procedure, Rule 41 (a) 2, is not intended to enlarge the discretionary power of the Court to dismiss. Rule 41 simply provides the method and manner of dismissing. Rule 41 (a) 2 states:

> "Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper."

This is not an arbitrary power. It is conditional, and the condition is providing the Court has the discretionary power to dismiss. It is not intended to deny to a litigant a substantive right. To argue otherwise would allow the Court, in the case of *Mutual Life Insurance Company* v. *Krejci, supra,* to refuse to take jurisdiction, in which case the Court states it is bound to take jurisdiction, and therefore it could not dismiss.

Had the petitioners (defendants), before the trial of the case, made a motion under the Federal Rules of Civil Procedure, Rule 56, for a summary judgment, then based on the pleadings, the petitioners would have been entitled to a judgment as a matter of law. How, then, can the petitioners, at the trial of the case, with the same pleadings and with the further admission by the respondent (plaintiff) that the action was not timely brought, be entitled to anything less than they would have been entitled to under the motion for a summary judgment? With three other causes of action remaining in the declaration, it was deemed advisable not to make the motion for a summary judgment, that it could be accomplished as effectively during the trial of the case, thus saving the time of the Court and both counsel.

By the allowance of the motion to dismiss (R. 15), the petitioners have been deprived of a substantive right without due process of law. The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. *Postal Telegraph & Cable Company* v. *Newport,* 247 U.S. 464.

The Court states in the case of *State of Kansas* v. *Occidental Life Insurance Company,* 95 Fed. (2d) 937:

> "The basic requisites of due process when applied to judicial proceedings are that, having due regard to the form and nature of the proceedings and the char-

> acter of the rights which may be affected, the order, judgment or decree be entered by a court clothed with jurisdiction of the subject matter, and that the party or parties bound by it have notice and be afforded an opportunity to present every available defense."

In a pending case between the same parties, based on the same cause of action, in the Probate Court of Middlesex County, Massachusetts, the matter is regulated by Massachusetts General Laws, Chapter 198. The estate there had been represented as insolvent and commissioners were appointed and determined the claims. Chapter 198, Section 11, provides that a creditor who was dissatisfied by the action of the Commission may appeal to the Superior Court. Section 13 provides that a judgment rendered shall be conclusive and the list of debts altered by the Probate Court to conform thereto. Section 31 provides that no action shall be maintained against an estate after it is represented insolvent unless it be for a claim entitled to a preference; that the judgment rendered therein shall be conclusive. In the instant case it is a preferred claim and the judgment rendered therein, being conclusive, would be *res adjudicata* in the Probate Court.

The rule is that no appeal will lie from an order denying a motion to vacate or modify a judgment, decree or order. *Republic Steel Company* v. *Richfield Oil Company,* 74 Fed. (2d) 907.

In the case reported, 125 Fed. (2d) 67, between the same parties, based on the same cause of action, the Court states:

> "We conclude that the thing for us to do is to vacate the order (R. 11) of March 31, 1941, amending the original judgment, and to remand the case to the District Court with leave to the plaintiff to move for an order under Rule 41 (b), [subsequently amended to read 'Rule 41 (a) 2'], allowing the plaintiff to dismiss

the first cause of action upon terms and conditions as the Court deems proper."

In thus remanding the case it was not so final as to allow a petition for a writ of certiorari in that case Therefore both cases, 125 Fed. (2d) 67, and the case No. 3911, *Frank W. Lyman et al., Executors, v. United States of America,* are now properly before this Court for a determination of the question here involved; but for the Court in 125 Fed. (2d) 67 to vacate the judgment is the virtual allowing of an appeal from the order (R. 14) denying a motion (R. 11) to vacate a judgment, from which no appeal will lie.

Conclusion.

In bringing an action in the United States Courts with the same case pending in the Probate Court of Middlesex County, Massachusetts, the respondent has chosen the forum in which it wished to prosecute its claim. The petitioners, having been duly summoned, answered to the merits of the claims. They have not had an opportunity to have their defense considered. Had the Court, as it was bound, taken jurisdiction and the plea of the Statute of Limitations been adjudicated, then judgment would have followed for the petitioners. To allow the respondent to dismiss the action deprives the petitioners of property and substantive rights.

Here the issue is not what the petitioners got, but what they should have gotten as a matter of right. The material thing is that the Court should have taken jurisdiction.

Respectfully submitted,
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